UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW RUTHERFORD, Plaintiff, v. JASON McKISSACK et. al., Defendants.	CASE NO. C09-1693 MJP ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This comes before the Court on Defendants' motion for summary judgment (Dkt. No. 65) and Plaintiff's motion for partial summary judgment (Dkt. No. 59). Having reviewed the motions, the responses (Dkt. No. 73 and 78), the replies (Dkt. No. 76 and 81), and all related filings, the Court DENIES Plaintiff's motion for partial summary judgment and GRANTS in part and DENIES in part Defendants' motion for summary judgment.

Background

After midnight on September 9, 2007, Plaintiff Andrew Rutherford and friends Myo Thant and Jared Alfonzo were riding in a Jeep driven by Alfonzo. (Dkt. No 79-7 at 3.) Alfonzo

ran a red light in front of Defendant Jonathan Chin's car, forcing Chin to brake suddenly. (Dkt. No. 61 at 9.) Chin, a Seattle Police Department officer, suspected the Jeep's driver of driving while intoxicated ("DUI") or driving recklessly, and followed the Jeep even though he was off-duty, out of uniform, and in his personal vehicle. (Id. at 8–9.)

Chin observed items discarded out of the Jeep's windows as he followed it to West Seattle, where he briefly lost sight of the Jeep. (Id. at 13–14.) Chin took this as evidence of possible theft. (Id. at 14.) When Chin regained sight of the Jeep, it was parked and Plaintiff, Alfonzo, and Thant were standing next to the Jeep. (Id.) Chin exited his car, confronted them and identified himself as a police officer. (Id. at 18.) Chin claims Thant approached aggressively, prompting Chin to draw his gun and ordered Thant to submit to a pat-down. (Id. at 18–19.) Chin then called for "fast backup"—a high priority request for assistance—and ordered Plaintiff and his companions sit on the street in front of Chin's car. (Id. at 20.) In response to Chin's questions, Alfonzo admitted to driving the Jeep. (Id. at 21.) Chin had not previously been able to identify the driver. (Id. at 17.)

Defendant Jason McKissack was the first officer responding to Chin's call for fast backup. (Dkt. No. 60-6 at 4.) Plaintiff believed McKissack's rapidly approaching car would hit him, and "jumped up and ran" to get out of its way. (Dkt. No 60-7 at 2.) When Plaintiff did not comply with Chin's orders to sit back down, Chin grabbed Plaintiff's head to force him to the ground. (Dkt. No. 61 at 24.) McKissack and Defendant Joshua Rurey, another responding officer, exited their cars and assisted Chin in restraining Plaintiff. (Id. at 25; Dkt. No. 66-2 at 29.) McKissack pushed Plaintiff's face into the pavement with his hands and knee in the process of handcuffing him, wounding Plaintiff's forehead. (Dkt. No. 60-6 at 8–10.) Arresting officers photographed Plaintiff's injuries. (Dkt. No. 63.)

Defendant City of Seattle ("City Defendant") charged Plaintiff with obstructing a public officer, but dismissed the charges without prejudice. (Dkt. No. 60-8 at 2.)

Plaintiff filed suit against Chin, McKissack, and Rurey (collectively, "Officer Defendants") in state court and Defendants removed to this Court based on federal question jurisdiction. Specifically, Plaintiff alleged the following Fourth Amendment violations: (1) unlawful detention, (2) unlawful arrest, and (3) use of excessive force. In addition, Defendants sued under state law for (4) assault and battery, (5) false imprisonment, and (6) malicious prosecution stemming from dismissed charges. (Dkt. No. 4 at 9-12.) Plaintiff also named the City of Seattle ("City Defendant") as a defendant based on Monell and vicarious liability. By stipulation, the state tort law claims against the Officer Defendants were dismissed. (Dkt. No. 27.)

Analysis

I. Motion for Summary Judgment

Defendants seek summary judgment with respect to all six of Plaintiff's remaining constitutional and state tort claims. Plaintiff seeks partial summary judgment on his constitutional claims for (1) detention without reasonable suspicion and (2) arrest without probable cause.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there are no genuine issues of material fact for trial and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Material facts are those "that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The underlying facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A. Claims Against Officer Defendants

1. Unlawful Detention

Both parties seek summary judgment on Rutherford's Fourth Amendment claim for unlawful detention. Officer Defendants assert qualified immunity bars Plaintiff's claims. The Court agrees.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 129 S. Ct. 808, 815 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Id. (quotation omitted).

To determine whether qualified immunity applies, the Court has discretion in applying one or both steps of a two-step inquiry set out in Saucier v. Katz, 533 U.S. 194, 201 (2001). Pearson, 129 S. Ct. at 818. The two-step inquiry considers whether the plaintiff has alleged a violation of a constitutional right and/or whether the right at issue was "clearly established" at

the time of the alleged misconduct. Id. at 815-16. To be considered "clearly established" for the purposes of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Rutherford's claim fails at the first-step of the inquiry—he fails to demonstrate a constitutional violation. The Fourth Amendment allows police to seize a suspect if there is reasonable suspicion that the suspect has been or is about to be involved in a crime. United States v. Hall, 974 F.2d 1201, 1204 (9th Cir. 1992). Reasonableness is determined looking at the totality of circumstances and the officers' collective knowledge, training, and experience. Id. Notably, in Maryland v. Wilson the Supreme Court held police may order passengers out of a car during a traffic stop without triggering a Fourth Amendment violation. 519 U.S. 408, 410 (1997). In addition, the Ninth Circuit allows police to "detain passengers during a traffic stop, whether it is by ordering the passenger to remain inside the automobile or by ordering the passenger to get back into an automobile that he or she voluntarily exited." United States v. Williams, 419 F.3d 1029, 1032 (9th Cir. 2005). Citing Wilson, the Ninth Circuit recognized the "value of giving officers control over the movements of people involved in a traffic stop as helpful in limiting the risk of danger." Id. at 1034.

Here, Chin had reasonable suspicion that Plaintiff was the Jeep's driver and possibly intoxicated when he detained Plaintiff. (Dkt. No. 61 at 15–16.) Chin observed Plaintiff standing next to a Jeep which he had observed being driven recklessly. While Plaintiff argues Chin's basis for reasonable suspicion ceased when Alfonzo admitted to being the Jeep's driver, the Court disagrees. As Chin states, it is often difficult to identify the driver when there are several vehicle occupants because people sometimes lie to cover for drunken drivers. (Dkt. No. 66, Ex.

4 at 71.) The situation faced by Chin presented the same concerns recognized in Wilson and Williams: the necessity of police to assert control when there are passengers in addition to the driver of a stopped car. Wilson, 519 U.S. at 414; see also Williams, 419 F.3d at 1034. Since Defendants had reasonable suspicion Plaintiff had been involved in a crime, the Court DISMISSES Plaintiff's claim for unlawful detention under the Fourth Amendment.

2. Unlawful Arrest

Both parties seek summary judgment on Rutherford's Fourth Amendment claim for unlawful arrest. Plaintiff claims he was unlawfully arrested (1) when Chin ordered him to sit on the ground at gunpoint, and (2) when Chin and the other Officer Defendants forced Plaintiff to the ground after Plaintiff stood and ran. Defendants dispute the first event amounted to an arrest, and argue that probable cause justified the arrest in either case. The Court finds a factual dispute exists as to when the arrest occurred and qualified immunity does not apply.

First, a warrantless arrest without probable cause violates the Fourth Amendment. Beck v. Ohio, 379 U.S. 89, 91 (1964). Probable cause is determined at the moment of arrest, looking at all circumstances known to the police. Id. When a detention becomes an arrest is a fact-specific determination made looking to the totality of the circumstances. Washington v. Lambert, 98 F.3d 1181 (9th Cir. 1996). Probable cause must be individualized to the specific person arrested. Maryland v. Pringle, 540 U.S. 366, 371 (2003). Unholstering guns and forcing suspects to the ground both suggest arrest. Id. at 1188–89. However, "where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight" aggressive police action may not convert detention into an arrest. Id. at 1189 (listing non-exclusive factors allowing intrusive police force). In Allen v. City of Los Angeles, the Ninth Circuit held no arrest had occurred even when police ordered a suspect at gunpoint to lie on the

ground while being handcuffed. 66 F.3d 1052, 1057 (9th Cir. 1995). Because the suspect had led the police on a high-speed chase and was uncooperative and drunk when pulled over, the force used was reasonable and did not convert the stop into an arrest. Id.

Here, a factual dispute exists as to when the arrest occurred. Defendants argue the gun pointed at Plaintiff did not convert the investigatory stop into an arrest. They argue Chin acted reasonably when he drew his gun because of the reckless driving he observed while following the Jeep, and Plaintiff and his companions' drunken aggressiveness when approached. Chin testifies after he identified himself as police, Thant approached him yelling "Oh SPD?" with his arms raised "as if he were going to fight." (Dkt. No. 70 at 4.) According to Chin, when he drew his gun Alfonzo and Plaintiff also advanced on him, yelling. (Id.) This version of events—both Plaintiff's alleged behavior and Defendants' response—is similar to the facts in Allen. It supports finding no arrest occurred when Chin initially detained Plaintiff because the "possibility of danger or flight" justified the force used. Lambert, 98 F.3d at 1189.

Plaintiff's version, however, suggests he and his companions were cooperative and non-violent during the encounter, and that Plaintiff was not drunk. (Dkt. No. 60-3 at 3, 5–6; Dkt. 79-7 at 3.) According to Plaintiff, Officer Defendants lacked the "special circumstances" allowing the "especially intrusive means of effecting a stop" they employed. Lambert, 98 F.3d at 1189. Under this interpretation, Chin arrested Plaintiff when he first ordered Plaintiff to sit at gunpoint. While Defendants argue that, even if an arrest was found at this time, probable cause existed as to DUI or reckless driving, Defendants' argument fails to establish individualized probable cause. See Pringle, 540 U.S. at 371. At that time, Alonzo had admitted to being the driver of the Jeep. While Chin may have had reasonable suspicion sufficient to initially detain Plaintiff, Chin did not have individualized probable cause to believe Plaintiff was the driver of the Jeep. Since

Plaintiff's version of the facts demonstrates a violation of the Fourth Amendment and a factual dispute exists, the Court finds summary judgment inappropriate.

Second, qualified immunity does not shield Defendants from liability. As discussed, Plaintiff demonstrated a constitutional violation satisfying the first step of the qualified immunity analysis. The Court finds Plaintiff also satisfies the second step because a reasonable officer would have known arresting Plaintiff violated a clearly established right. Even when there is probable cause to believe a driver has committed a vehicular offense, "there is no such reason to stop or detain the passengers." Wilson, 519 U.S. at 413. "Mere presence" near a suspected crime does not create probable cause. United States v. Soyland, 3 F.3d 1312, 1314 (9th Cir. 1993). Probable cause must be particularized to the specific person arrested. Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

Here, Plaintiff and his companions were standing outside the Jeep as Chin initially approached. Chin drew his gun when Thant approached Chin and arrested Thant along with Plaintiff and Alfonzo. A reasonable officer would not think Thant's approach created individualized probable cause to arrest Plaintiff for a DUI or reckless driving. There is not a "sufficient link" between Plaintiff, who was standing outside the Jeep and maintains he was not intoxicated, and the suspected criminal activity. Soyland, 3 F.3d at 1314. Chin admits he did not have probable cause without further investigation at the time he approached. (Dkt. No. 61 at 15.) The Office of Professional Accountability ("OPA") review of the Officer Defendants' conduct recommended supervisory intervention for Chin, noting concern with "the legal justification Officer Chin had to require all three occupants to sit down on the ground." (Dkt. No. 60-9 at 2–3.) The requirement of individualized probable cause was not met with regards to Plaintiff. Since Plaintiff's constitutional right was clearly established, the Court finds qualified immunity

does not apply. The Court DENIES both parties' motions for summary judgment because a factual dispute exists as to when the arrest occurred.

3. Excessive Force

Defendants seek summary judgment on Plaintiff's Fourth Amendment claim of excessive force, arguing the Officer Defendants' actions were reasonable under the circumstances and asserting qualified immunity bars the claim. The Court disagrees.

"Summary judgment in excessive force cases should be granted sparingly even with respect to the issue of qualified immunity." Luchtel, 623 F.3d at 980 (quotes omitted). Whether police force during an arrest violates the Fourth Amendment is a question of objective reasonableness, looking at the totality of circumstances. Luchtel v. Hagemann, 623 F.3d 975, 989 (9th Cir. 2010). Reasonableness is determined balancing the plaintiff's Fourth Amendment interest against the countervailing government interest, looking to (1) the severity of the crime at issue, (2) whether the plaintiff posed an immediate threat to the safety of the officers or others, and (3) whether the plaintiff actively resisted arrest or attempted to evade arrest by flight. Id. (citing Graham v. Connor, 490 U.S. 386, 396 (1989). Also relevant is (4) the quantum of force used against plaintiff. Id. The second factor, the threat posed by the suspect, is the most important. Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005).

Here, the first, second, and fourth factors weigh against summary judgment. Under the first factor, the only crimes suspected were DUI, reckless driving, and obstructing a public servant. All three crimes are generally gross misdemeanors under Washington law, and thus not severe. RCW 46.61.502(5); 46.61.500(1); RCW 9A.76.020(3); see also Luchtel, 623 F.3d at 981 (obstruction not a severe crime absent violent resistance). Under the second factor, Plaintiff testifies he did not resist the Officer Defendants as they subdued him and Defendants assert no

basis for believing him to be armed. (Dkt. No. 66-1 at 13.) Thus, the immediate threat he posed to the safety of police officers and bystanders was minimal as Plaintiff was unarmed and noncombative. See Davis v. City of Las Vegas, 478 F.3d 1048, 1054 (9th Cir. 2007). As to the fourth factor, the Officer Defendants allegedly pointed a gun at Plaintiff, grabbed Plaintiff's neck, forced him face-first onto the pavement, and proceeded to punch or kick him in the back and leg and "crush" his head. (Dkt. No. 66-1 at 9–10.) Alfonzo testifies the Officer Defendants hit or "planted" Plaintiff's face against the pavement. (Dkt. No. 60-3 at 3.) As a result, Plaintiff briefly passed out and "saw stars." (Id. at 13.) A jury may find the quantum force used against Plaintiff was excessive.

The third factor, resistance or attempted flight, weighs slightly in Defendants' favor at the time Plaintiff stood and ran. Plaintiff admits to making a "swift movement" as McKissack's car approached. (Dkt. No 66-1 at 9.) Objectively, this would appear to a reasonable officer as flight. However, Defendants do not gain the benefit of this factor at the time Chin first pointed his gun at Plaintiff, which occurred before Plaintiff's apparent flight. Because the other factors—including the most important, the threat posed by Plaintiff—cut against Defendants, a jury may find the alleged conduct was not reasonable under the circumstances and amounted to excessive force under the Fourth Amendment.

In addition, the Court finds qualified immunity does not apply--each of the Officer Defendants' alleged conduct clearly violated established law. Chin aimed his gun at Plaintiff, and later "grabb[ing him] by the neck," forcing him to the ground. (Dkt. No. 66-1 at 8–9.) In Robinson, the Ninth Circuit recognized, that "as a general principle" pointing a gun at an unarmed, nonthreatening suspect during an investigation violates the Fourth Amendment. 278 F.3d at 1015. Thus, Chin's alleged behavior violated established law.

McKissack and Rurey's assistance in restraining Plaintiff may also be viewed as excessive force. Plaintiff's facts show McKissack "slamm[ing]" Plaintiff's face into the pavement. (Dkt. No. 60-3 at 3.) Rurey admits to kicking at Plaintiff's foot to straighten out Plaintiff's leg, and Plaintiff claims he sustained bruises from kicks to his leg. (Dkt. Nos. 66-1 at 14; 66-2 at 31–32.) The factors considered above were clearly established at the time of the conduct. Graham, 490 U.S. 386; Davis, 478 F.3d at 1055. Under the Graham factors, no reasonable officer would have thought slamming the face of an unresisting, nonthreatening suspect into the pavement and kicking him was lawful. See Davis, 478 F.3d at 1055.

The Court DENIES Defendants' motion for summary judgment with respect to excessive force.

B. Claims Against City Defendants

1. Constitutional Claims

Defendants assert the City is not liable for Plaintiff's constitutional injuries whether under a theory that an official policy existed or by ratification. The Court agrees.

a. Policy

A municipality is subject to § 1983 liability if it causes a constitutional violation through an official policy. Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978). Liability for failing to protect a plaintiff's constitutional rights requires showing (1) the plaintiff was deprived of a constitutional right, (2) the municipality had a policy, (3) this policy amounts to deliberate indifference to the plaintiff's constitutional right, and (4) the policy was the moving force behind the constitutional violation. City of Canton v. Harris, 489 U.S. 378, 388–91 (1989). Plaintiff's claim against the City fails on the second, third, and fourth elements.

As to the second element, Plaintiff admits the Seattle Police Department has no specific policy for off-duty police officers. (Dkt. No. 78 at 20.) Plaintiff's argument that this amounts to a "no-policy" policy is unconvincing, because off-duty officers are still required to adhere to all department policies even when off duty. (Dkt. No. 79-6 at 9.) As to the third element, Plaintiff fails to suggest the "no policy" policy is an act of deliberate indifference on the policymakers' part.

As to the fourth element, even if the no-policy theory were accepted, Plaintiff fails to show how it was the moving force behind Plaintiff's constitutional injuries. The OPA review by Kathryn Olson concluded Chin put himself in an "unnecessary and potentially dangerous situation" by engaging Plaintiff and his companions. (Dkt. No. 60-9 at 3.) Supervisory intervention was proposed for Chin regarding exercise of discretion. (Id.) Plaintiff does not show how existing policy can be the moving force behind Chin's conduct, while simultaneously recommending supervisory intervention. Plaintiff argues the City should have adopted a policy similar to the Model Policy of Off-Duty Conduct identified by Plaintiff's expert Donald Van Blaricom, which recommends off-duty officers not become involved in minor crimes in which they are involved. (Dkt. No 64-1 at 5–6.) This Model Policy would have done no more than discourage Chin's actions, which the existing policy already does. The Court finds no basis for Monell liability.

b. Ratification

A municipality is subject to § 1983 liability if an authorized policymaker (1) ratifies a subordinate's unconstitutional behavior, and (2) approves the basis for the behavior. Christie v. Iopa, 176 F.3d 1231, 1238–39 (9th Cir. 1999) (citing City of St. Louis v. Praprotnik, 485 U.S.

112, 127 (1988)). Ratification is ordinarily a question for the jury. Id. at 1239. Plaintiff's claim fails on the second element.

Here, Plaintiff argues the OPA report exonerating the Officer Defendants qualifies as ratification. (Dkt. No. 60-9.) Relying on the declaration of Van Blaricom, Plaintiff argues the OPA report creates the presumption that Seattle Police Department policy makers approved the Officer Defendants' actions. (Dkt. No. 64-1 at 8.) However, there is no evidence that the Chief of Police knew about the constitutional violation, as required for ratification. See Praprotnik, 485 U.S. at 127; see also Christie v. Iopa, 176 F.3d 1231, 1239 (9th Cir. 1999). As stated by the OPA report preparer, the OPA report was not brought to the attention of the Chief of Police. In addition, the OPA report also proposed supervisory intervention for Chin regarding exercise of discretion, which undermines Plaintiff's argument that it amounted to ratification. (Dkt. No. 60-9.) Since Plaintiff has failed to establish necessary elements of municipal liability under either theory, the Court DISMISSES the constitutional claims against the City Defendant.

2. State Tort Claims

Plaintiff also sued Defendants for assault and battery and false imprisonment under state law. While Plaintiff voluntarily dismissed Officer Defendants from the state tort claims, City Defendant seeks summary judgment for claims remaining against the munipality. Cf. Orrick v. Fox, 828 P.2d 12, 19 (Wash.Ct.App. 1992)(recognizing plaintiff's ability to sue either employer or employee or both together).

City Defendant argues any intentional torts by Officer Defendants were not committed "in furtherance of the master's business," and therefore precludes liability. Kuehn v. White, 24 Wn. App. 274, 277 (1979). The Court disagrees. Defendants' argument ignores Defendants' admission that "Seattle Police Officers McKissack, Rurrey, Patterson, Boggs, and Chin were

employed as Seattle Police Officers by the City of Seattle and that they were acting within the course and scope of their respective duties at all relevant times." (Dkt. No. 60-2 at 3, ¶ 3.) The cases relied on by Defendant only support the proposition that an employer is not liable for intentional torts committed "in order to effect a purpose of [an employee's] own." Blenheim v. Dawson & Hall, 35 Wn. App. 435, 440 (1983). Here, Defendants admit the purpose of the Officer Defendants' actions was the City's.

To the extent City Defendant believes it is not vicariously liable given that officers committed no tort, City Defendant's argument also fails. As discussed above, it is debatable as to whether the Officer Defendants had probable cause to arrest Plaintiff, or whether excessive force was used. City Defendant may still be liable for assault and battery and false imprisonment under a theory of respondeat superior. The Court DENIES Defendant's motion for summary judgment on the state tort law claims.

3. Malicious Prosecution

Defendants seek a determination that the City of Seattle did not maliciously prosecute Plaintiff. Defendants only raise a potential basis for granting this relief in their reply.

The State of Washington requires five elements to show malicious prosecution: the prosecution must have been instituted or continued (1) by the defendant, (2) without probable cause to do so, (3) and with malice; (4) the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. Hanson v. City of Snohomish, 121 Wn.2d 552, 558 (1993). Defendants argue the claim fails because Plaintiff has not shown lack of probable cause, and assert Plaintiff has defaulted by failing to substantively respond. In their reply, Defendants also assert for the first time the lack of evidence of malice.

As discussed above, a jury could conclude from Plaintiff's evidence there was no probable cause to arrest him. As for the lack of malice, though the record contains no evidence of malice, Plaintiff has had no opportunity to respond because Defendants raise the argument for the first time in their reply. The Court grants Plaintiff leave to file a surreply before deciding the issue.

II. Motions to Strike

1. Plaintiff's Motion to Strike

On Fed. R. Evid. 401 and 403 grounds, Plaintiff seeks to strike evidence referring to (1) his alleged intoxication, (2) the Jeep's reckless driving, (3) the possibility Plaintiff drove the Jeep, and (4) reference to witness unavailability as the reason for dismissing charges against Plaintiff. (Dkt. No. 78 at 2–5.)

The first two items Plaintiff wishes struck are highly relevant in determining whether an arrest took place. Because Plaintiff was only a passenger in the Jeep, prejudice against drunken drivers does not apply to him. The third item, Chin's deposition testimony that he had basis to believe Plaintiff drove the Jeep, is relevant to establishing probable cause to arrest Plaintiff for DUI and reckless driving. The information poses no danger of prejudice. The fourth item, Defendants' suggestion that charges against Plaintiff were dropped only because of McKissack's unavailability as a witness, is unsupported by evidence and redundant. At most this indicates that the City of Seattle felt evidence of Plaintiff's aggression and resistance was strong. Because this other evidence is already before the Court, the City's evaluation adds nothing to this Court's analysis. The Court DENIES Plaintiff's motion to strike items (1), (2), and (3), and GRANTS Plaintiff's motion to strike item (4).

2. Defendant's Motion to Strike

Defendants seeks to strike the opinion provided by Van Blaricom that "there was neither reasonable suspicion to detain nor probable cause to arrest Plaintiff" as an impermissible legal conclusion. (Dkt. No. 64-1 at 7.) Experts may give their opinions as to the ultimate issues of a case, but not ultimate issues of law. Muhktar v. California State University, Hayward, 299 F.3d 1053, 1065 n.10 (9th Cir.2002).

Here, Van Blaricom expressly disclaimed any intent to offer opinions as to questions of law. (Id. at 3 ("My use of certain [legal] terms . . . merely reflects my training, in applying reasonable standards of care to officers' conduct, and does not presume or imply a statement of any legal opinion.") Other courts considering Van Blaricom's similarly disclaimed testimony have permitted it, but cautioned that at trial "both the questions posed to him and his answers should avoid language in the form of a legal conclusion." Estate of Bojcic v. City of San Jose, No. C05 3877 RS, 2007 WL 3314008, at *3 (N.D. Cal. Nov. 6, 2007). This course of action is appropriate here.

The Court DENIES Defendants' motion to strike, but cautions Plaintiff and Plaintiff's expert to avoid legally conclusory testimony at trial.

Conclusion

The Court DENIES Plaintiff's motion for partial summary judgment and GRANTS in part and DENIES in part Defendants' motion for summary judgment. Specifically, the Court ORDERS:

1. Plaintiff's claim of unlawful detention against Officer Defendants be DISMISSED. Plaintiff fails to demonstrate a constitutional violation. While Plaintiff was later discovered to be a passenger, Defendant had reasonable suspicion to detain Plaintiff for driving under the influence and reckless driving.

2. With respect to Plaintiff's unlawful arrest claim against Officer Defendants, the parties' motions for summary judgment are both DENIED. A factual dispute exists as to when Plaintiff was arrested and qualified immunity does not apply.
3. Defendant's motion for summary judgment as to Plaintiff's excessive force claim against Officer Defendants is DENIED. A factual dispute exists as to the force used against Plaintiff and qualified immunity does not apply.
4. Plaintiff's constitutional claims against City Defendant (for unlawful detention, unlawful arrest, and excessive force) are DISMISSED. Plaintiff fails to demonstrate City Defendant is liable under Monell or due to ratification.
5. Defendants' motion for summary judgment as to state law claims is DENIED. City Defendant admitted that Officer Defendants were acting within the scope of their employment at all times; therefore, respondeat superior applies.
6. With respect to the malicious prosecution claim, Plaintiff is GRANTED LEAVE to file a surreply regarding the issue of malice. The surreply must be filed within seven (7) days of entry of this Order.
7. Plaintiff's request to strike evidence relating to Plaintiff's alleged intoxication, the Jeep's reckless driving and the possibility Plaintiff drove the Jeep, is DENIED.
8. Plaintiff's request to strike reference to witness unavailability as the reason for dismissing charges against Plaintiff is GRANTED.

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9. Defendants' request to strike the opinion of Van Blaricom is DENIED.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 25th day of March, 2011.

Marsha J. Pechman
United States District Judge